

**IN THE HIGH COURT OF HIMACHAL PRADESH
SHIMLA**

Civil Revision No.59 of 2007.
Judgment Reserved on: 30.05.2007
Date of decision:01.06.2007

Prem Chand & Others

....Petitioners

Versus

Pushpinder Kumar & Others.

....Respondents.

Coram

The Hon'ble Mr.Justice Dev Darshan Sud,J.

Whether approved for reporting ?¹

For the Petitioners: Mr.Ajay Sharma, Advocate.

For the Respondents: Mr.Suneet Goel, Advocate.

Dev Darshan Sud,J.

This revision petition has been preferred by the applicants, who were the appellants before the learned Appellate Court, against the order dated 7.11.2003 passed by the learned District Judge, Hamirpur, refusing to condone delay in filing application for restoration of the appeal.

An application under Order 41 Rule 19 read with Section 151 of the Code of Civil Procedure for re-admission of the appeal dismissed in default on 25.10.1999 was filed by the petitioner before the learned District Judge, Hamirpur.

¹ *Whether the reporters of Local Papers may be allowed to see the judgement?*

An application under Section 5 of the Limitation Act was also filed for condonation of delay in filing the application under Order 41 Rule 19 of the Code of Civil Procedure. In the application for condonation of delay, it was averred that the same could not be filed within time as the matter had been sent to the learned Appellate Court on remand by the High Court, where the date of appearance of the parties had been fixed for 25.10.1999. The applicants had submitted that the counsel representing them in the High Court had not informed them about the date before the learned Appellate Court. Second ground urged was that late Shri Jai Karan, who was prosecuting the case had been taken ill and was being treated at PGI, Chandigarh and in these circumstances could not look after the case.

Learned Court below, after detailed discussion, held that the application for restoration of the appeal had been filed after a period of more than 11 months which was beyond the prescribed period of limitation of 30 days. In the totality of the circumstances, it was held that the application was barred by limitation and there was no justifiable reason to condone delay.

I have heard learned counsel for the parties and have gone through the record.

The learned first appellate Court has misdirected itself by ignoring the fact that there was

no evidence on the record to show that the date of appearance had been communicated to the petitioner. It is by now well settled that no party should suffer on account of the fault of the lawyer.

In **Rafiq and another vs. Munshilal and another AIR 1981 SC 1400**, the Hon'ble Supreme Court has held:-

"... .. What is the fault of the party who having done everything in his power and expected of him would suffer because of the default of his advocate. If we reject this appeal, as Mr.A.K. Sanghi invited us to do, the only one who would suffer would not be the lawyer who did not appear but the party whose interest he represented. The problem that agitates us is whether it is proper that the party should suffer for the inaction, deliberate omission, or misdemeanour of his agent. The answer obviously is in the negative."

Of-course, it is settled by now that the party should be vigilant while prosecuting the case. It is undisputed that the delay should be reasonably explained and that limitation vests right in the opposite party. However, at the same time a rigid stand cannot be adopted for dealing with the application for condonation of delay. A hyper-technical approach to the case is to be avoided.

In the circumstances, this revision petition is allowed subject to the condition that the petitioner shall pay costs of Rs.5,500/- to the respondents on the first date of appearance before the learned appellate Court. The order of the District Judge dismissing the application under Section 5 of the Limitation Act is set aside. In case of non-payment, this revision petition will be deemed to be dismissed and the order of the learned District Judge, which is under challenge, will revive.

Parties are directed to appear before the learned District Judge, Hamirpur on **29th June, 2007**. The learned District Judge will decide the application under Order 41 Rule 19 on its merits. The records of the appellate Court be sent back immediately.

June 1, 2007.
(aks)

(Dev Darshan Sud)
Judge.